Boyd v. Miss. Dep't of Pub. Safety

United States Court of Appeals for the Fifth Circuit

October 3, 2018, Filed

No. 18-60245 Summary Calendar

Reporter

2018 U.S. App. LEXIS 27995 *; ___ Fed. Appx. ___; 2018 WL 4818992

PATRICK BOYD, Plaintiff-Appellant, v. MISSISSIPPI DEPARTMENT OF PUBLIC SAFETY; ALBERT SANTA CRUZ, Individually and in his Official Capacity as Commissioner of the Mississippi Department of Public Safety; DONNELL BERRY, Individually and in his Official Capacity as Director of Mississippi Highway Safety Patrol and Assistant Commissioner of the Department of Public Safety, Defendants-Appellees.

Counsel: For PATRICK BOYD, Plaintiff-Appellant, Dennis Lee Horn, Shirley Elizabeth Payne, Horn & Payne, PLLC, Madison, MS.

For MISSISSIPPI DEPARTMENT OF PUBLIC SAFETY; ALBERT SANTA CRUZ, Individually and in his Official Capacity as Commissioner of the Mississippi Department of Public Safety; DONNELL BERRY, Individually and in his Official Capacity as Director of Mississippi Highway Safety Patrol and Assistant Commissioner of the Department of Public Safety, Defendants-Appellees: Benny McCalip May, Esq., Office of the Attorney General for the State of Mississippi, Jackson, MS.

Judges: Before KING, SOUTHWICK, and ENGELHARDT, Circuit Judges.

Opinion

PER CURIAM:*

Patrick Boyd brought suit against his employer, the Mississippi Department of Public Safety, and against two of its officers for racial discrimination and for violation of various constitutional rights. The district court granted summary judgment to the defendants. We AFFIRM.

FACTUAL AND PROCEDURAL BACKGROUND

Boyd began his employment with the Mississippi Department of Public Safety ("MDPS") as a Trooper in December 2000. At the time of the events underlying this dispute, Boyd was Captain of Troop H and a member of the Strategic Weapons and Tactics ("SWAT") team. Boyd's race is white. On March 26, 2015, Boyd sent an email to other officers and employees of the MDPS, to which he attached a list of grievances. Some concerned MDPS's promotion policies and testing, and were motivated in part by Boyd's belief that the MDPS was "favoring one race over the others." Boyd stated in his deposition that all the recipients of his email were

* Pursuant to **5TH CIR. R. 47.5**, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in **5TH CIR. R. 47.5.4**.

white, and none of the recipients were above Boyd in the chain of command.

On April 8, Boyd was called into a meeting at MDPS headquarters. Major O'Banner, Colonel Berry, Lieutenant Colonel Myers, and Commissioner Santa Cruz were present. During this meeting, which lasted approximately one hour, Boyd's superiors questioned him about the March 26 email.

On April 13, Boyd was handed at MDPS headquarters in Jackson an order transferring him from Troop H to the salvage division. That same day, Boyd received an email notifying him that he was removed from the SWAT team. Colonel Berry testified that he transferred Boyd to the salvage division because Boyd had caused a "racial ruckus" and tension in Troop H. He also said he removed Boyd from the SWAT team because SWAT team members "didn't feel safe going into a building" with Boyd.

After the April 13 meeting, Boyd was involved in a vehicle accident while driving a patrol vehicle on Interstate 20 in the rain. After passing another vehicle, Boyd was traveling approximately 100 miles-per-hour in a 70 miles-per-hour zone. As Boyd moved back into the left lane after passing the vehicle from the right, he was cresting a hill. Boyd hydroplaned, hit a guard rail, and totaled his patrol vehicle.

On May 13, Boyd received a document that charged him with a "Group III" offense for violating "safety rules where there exists a threat to life or human safety." The charges referenced a prior November

2014 memo that explained that speeding in patrol cars when not responding to an emergency may constitute a Group III offense. On May 28, a MDPS review panel held a hearing on the charges. Boyd was represented by counsel, permitted to call his own witnesses, and allowed to strike two members of the panel. The panel determined that Boyd violated a safety rule "where there exists a threat to life or human safety." On May 29, Boyd was terminated from the MDPS. The reason given for his termination was the Group III offense.

Boyd brought this suit on March 9, 2016. He sought damages as well as injunctive and declaratory relief, claiming that he was subjected to race discrimination under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, and 42 U.S.C. § 1981A. Boyd also claimed that his rights were violated under the First Amendment to the United States Constitution and the Equal Protection Clause of the Fourteenth Amendment, pursuant to 42 U.S.C. § 1983. After discovery was completed, the defendants moved for summary judgment. The district court found no genuine disputes of material fact as to any element of Boyd's claims and entered judgment for the defendants.

DISCUSSION

We review a grant of summary judgment *de novo*. *Cooley v. Hous. Auth. of City of Slidell,* 747 F.3d 295, 297 (5th Cir. 2014). "Summary judgment is warranted if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine

[dispute] as to any material fact and that the movant is entitled to judgment as a matter of law." *Id.* at 297-98 (alteration in original) (quoting *Duval v. N. Assurance Co. of Am.,* 722 F.3d 300, 303 (5th Cir. 2013)). We need not adopt the reasoning of the district court but "may affirm the district court's decision on any grounds supported by the record." *Phillips ex rel Phillips v. Monroe Cnty,* 311 F.3d 369, 376 (5th Cir. 2002).

I. Title VII Claim

Boyd argues that MDPS discriminated against him on the basis of race in violation of Title VII. Boyd's Title VII claim is analyzed under the burden shifting framework set forth in *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 802-805, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973). *Price v. Fed. Express Corp.,* 283 F.3d 715, 719-20 (5th Cir. 2002). "Under this three-part scheme, a plaintiff must first establish a prima facie case of discrimination by showing: (1) he belongs to a protected group; (2) he was qualified for the position sought; (3) he suffered an adverse employment action; and (4) he was replaced by someone outside the protected class." *Id.* at 720. If a plaintiff makes a prima facie case, the burden shifts to the employer to produce a legitimate, non-discriminatory reason for the adverse employment action. *Id.* If the defendant produces such a reason, the plaintiff must demonstrate that the defendant's proffered reason was a pretext for discrimination. *Id.*

Assuming without deciding that Boyd has made the required showing for a prima facie case, the defendants have articulated a legitimate non-discriminatory reason for Boyd's transfer to the salvage department and removal from the SWAT team, as well as his termination. The defendants stated that the purpose for the transfer to the salvage department was that Boyd caused a "racial ruckus" and tension within Troop H, and that he was removed from the SWAT team because some of the members "did not feel safe" working with Boyd. Further, the defendants presented evidence that the reason for termination was Boyd's violation of a Group III offense. These are all legitimate, non-discriminatory reasons.

Boyd therefore must, under the third step of the *McDonnell Douglas* framework, create a genuine factual dispute that his violation of a Group III offense was a pretext for racial discrimination. Boyd attempts to show pretext by using the accident record of Officer Marshall Pack, who is black and was not terminated after vehicle accidents. For the first time on appeal,[1] Boyd presents details on two accidents involving Pack. One involved Pack backing into a mile marker post at 5 miles per hour while he was assisting another officer with a mentally ill individual. The other involved Pack's apparently hitting a deer. Boyd has not shown

[1] Boyd did not discuss any specific comparable incident in the district court. The district court was dismissive: "Apparently, Plaintiff expects the court to scour these hundreds of pages and find a 'needle in a haystack.' "

that either accident involved a "threat to life or human safety."

Boyd, in his reply brief, also highlights a crash report concerning Officer Derandy Butler. Boyd argues that Butler was not disciplined, that Butler was traveling 88 miles-per-hour in a 55 miles-per-hour zone, and that Butler was "not [responding to] an 'emergency.'" Boyd, though, provides no evidence to support that Butler's actions were not in response to an emergency. Furthermore, the report cited by Boyd shows that the road was dry, and the weather conditions were clear at the time of Butler's accident, as distinguished from the weather during Boyd's accident that would cause speeding to be objectively more dangerous. None of this supports the claim of pretext.

Boyd's other argument in support of his contention that his termination for a Group III offense was a pretext for racial discrimination was that "Plaintiff also was more experienced and qualified than his black successors." The relevance of that escapes us. The issue is whether Boyd was fired for non-discriminatory reasons, not the qualifications of his successors.

Finally, Boyd's argument that the "pre-termination hearing" cannot "be used by the district court to determine guilt and allow termination of an employee" is not relevant to the question of pretext. Boyd does not argue that he was subjected to a different hearing process than individuals of a different race. Boyd presented no evidence that creates a genuine dispute of material fact as to the findings of the pre-termination

panel. Boyd has therefore not met his burden to introduce evidence to go before a jury on the issue of pretext.[2]

The district court properly granted summary judgment to the defendants on Boyd's Title VII claims.

II. Constitutional Claims

Boyd argues that his transfer to the salvage department, his removal from the SWAT team, and his termination constituted violations of the Equal Protection Clause of the Fourteenth Amendment and the First Amendment. He seeks injunctive and declaratory relief against the defendants in their official capacities and monetary damages against Commissioner Santa Cruz and Colonel Berry in their individual capacities.

The "inquiry into intentional discrimination is essentially the same for individual actions brought under Sections 1981 and 1983, and Title VII." *Lauderdale v. Tex. Dep't of Criminal Justice, Inst. Div.,* 512 F.3d 157, 166 (5th Cir. 2007) (quoting *Wallace v. Tex. Tech Univ.,* 80 F.3d 1042, 1047 (5th Cir. 1996)). We have already explained that Boyd did not meet his burden to show that the defendants' stated reasons for his transfer to the salvage department, removal from the SWAT team, and termination were pretextual. The district court was therefore correct in dismissing Boyd's

[2] Boyd attempts to attack the credibility of MDPS's stated reasons for his transfer from Troop H and the SWAT team but provides no evidence to support that the reasons were a pretext for racial discrimination.

Fourteenth Amendment Equal Protection claims against all defendants.

Boyd claims that his First Amendment rights, including the right to free speech, the right to petition for redress of grievances, and the right to free association, were violated by the defendants. This argument concerns his March 26 email listing grievances. Boyd has no evidence that his email motivated the department's decision to terminate him. We have explained that the undisputed evidence is that the termination was caused by his violation of a safety rule "where there exists a threat to life or human safety." We will analyze here the remaining claim, namely, that his transfer from Troop H to the salvage department and removal from the SWAT team were unlawful retaliation under the First Amendment.

To make a claim for retaliation under the First Amendment's right to free speech, the "plaintiff must establish that: (1) he suffered an adverse employment decision; (2) his speech involved a matter of public concern; (3) his interest in speaking outweighed the governmental defendant's interest in promoting efficiency; and (4) the protected speech motivated the defendant's conduct." *Howell v. Town of Ball,* 827 F.3d 515, 522 (5th Cir. 2016). We first address the balance of interests.[3] Pertinent considerations as to whether Boyd's interest in speaking outweighed MDPS's

[3] We express no opinion concerning (1) whether Boyd's transfer from Troop H to the salvage department was an adverse employment action nor (2) whether Boyd's email constitutes speech involving a matter of public concern.

interest in promoting efficiency include "whether the statement impairs discipline by superiors or harmony among co-workers, has a detrimental impact on close working relationships for which personal loyalty and confidence are necessary, or impedes the performance of the speaker's duties or interferes with the regular operation of the enterprise." *Rankin v. McPherson,* 483 U.S. 378, 388, 107 S. Ct. 2891, 97 L. Ed. 2d 315 (1987).

In a similar case, we held that a police officer's First Amendment interest in posting critical statements on social media concerning the police chief's leadership did not outweigh the police department's interest in preserving loyalty and close working relationships. *See Graziosi v. City of Greenville Miss.,* 775 F.3d 731, 740 (5th Cir. 2015). "Because 'police departments function as paramilitary organizations charged with maintaining public safety and order, they are given *more* latitude in their decisions regarding discipline and personnel regulations than an ordinary government employer.'" *Id.* (quoting *Nixon v. City of Houston,* 511 F.3d 494, 498 (5th Cir. 2007)). It was relevant that the department dismissed Graziosi to prevent insubordination. *Id.* We also credited the department's claim that there was "office buzz" concerning Graziosi's comments and held that the department did not need to wait for the buzz to become a "mini-insurrection." *Id.* at 741.

Here, Boyd wrote in his email that the grievances could be viewed as "in-fighting." In another email, Boyd said he did not want the first email to cause "hatred or animosity" among the officers, perhaps

recognizing his first email might have done so. Other uncontroverted evidence in the record supports that Boyd's email interfered with the operations of the department. For example, Colonel Berry testified that the email created a "racial ruckus" and that members of the SWAT team expressed concerns that they did not feel safe operating with Boyd. Following the reasoning of *Graziosi,* the department was justified in moving Boyd from Troop H and removing him from the SWAT team to maintain close working relationships and discipline within those groups. The district court did not err in granting summary judgment to the department on Boyd's First Amendment free speech claim.

Boyd's First Amendment right to petition for redress of grievances claim fails for the same reasons as his free speech claim. Retaliation claims for the right to petition are analyzed the same way as free speech retaliation claims; Boyd must show that he meets the four-prong First Amendment retaliation test. *Gibson v. Kilpatrick,* 838 F.3d 476, 481 (5th Cir. 2016). As already discussed, Boyd has not shown that his interest in petitioning for redress of grievances outweighs the MDPS's interest in efficiency in the workplace.

Finally, Boyd's claim that his right to free association was violated fails. Boyd has not introduced any evidence that his undefined association had any impact on the decision to transfer him, to remove him from the SWAT team, or to terminate him. To sustain a free association claim, Boyd is required to show that he suffered an adverse employment decision, that his interest in association outweighs the MDPS's interest

in promoting efficiency, and that his association motivated the MDPS's actions. *Breaux v. City of Garland,* 205 F.3d 150, 156, 157 n.12 (5th Cir. 2000). Because Boyd has not shown that his interest in free association outweighs the MDPS's interest in promoting efficiency and close working relationships, the department did not violate his right to freely associate.

Boyd's constitutional rights were not violated, which moots the issue of whether Commissioner Santa Cruz and Colonel Berry have qualified immunity. *See Pearson v. Callahan,* 555 U.S. 223, 236, 129 S. Ct. 808, 172 L. Ed. 2d 565 (2009).

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF
MISSISSIPPI NORTHERN DIVISION

PATRICK BOYD — PLAINTIFF

VS. — CIVIL ACTION NO. 3:16-CV-177 HTW-LRA

MISSISSIPPI DEPARTMENT OF PUBLIC SAFETY, ALBERT SANTA CRUZ, individually and in his official capacity as COMMISSIONER OF THE MISSISSIPPI DEPARTMENT OF PUBLIC SAFETY, and DONNELL BERRY, individually and in his official capacity as Director of Mississippi Highway Safety Patrol and ASSISTANT COMMISSIONER OF THE DEPARTMENT OF PUBLIC SAFETY — DEFENDANTS

MEMORANDUM OPINION AND ORDER

(Filed Mar. 27, 2018)

Before this court is a motion filed by the Defendants Mississippi Department of Public Safety (MDPS), Albert Santa Cruz, and Donnell Berry, for summary judgment in their favor, said motion being filed under

the auspices of Fed. R. Civ. P. 56[1] **[doc. no. 33]**. The targets of this summary judgment motion are the claims and assertions made by Plaintiff, Patrick Boyd ("Boyd"), in his complaint filed on March 9, 2016, and his amended complaint filed on April 14, 2016. Boyd brings this civil suit for damages, for injunctive relief, and declaratory judgment, contending that he was subjected to race discrimination in employment in violation of Title VII[2] of the Civil Rights Act of 1964, Title 42 U.S.C. §2000e, *et. seq*., and Title 42 U.S.C. § 1981A[3]. He also alleges violation of his rights under the First

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[1] **Rule 56. Summary Judgment.**

(a) Motion for Summary Judgment or Partial Summary Judgment. A party may move for summary judgment, identifying each claim or defense—or the part of each claim or defense—on which summary judgment is sought. The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. The court should state on the record the reasons for granting or denying the motion.

[2] Title VII is codified as 42 U.S.C. § 2000e, et seq. Title VII of the Civil Rights Act of 1964 prohibits employers (who employ 15 or more people) from discriminating against employees on the basis of sex, race, color, national origin, and religion.

[3] Title 42 U.S.C. § 1981A is entitled "Damages in cases of intentional discrimination in employment." It provides for right of recovery under the Civil Rights Act of 1964, against a respondent "who engaged in unlawful intentional discrimination prohibited under 42 U.S.C. §§ 2000e-2, 2000e-3, or 2000e-16 of the Act, including: compensatory damages (excluding back pay or other relief under §2000e-5(g)); and punitive damages (other than from a government agency or subdivision) for discriminatory practices done with malice or reckless indifference.

Amendment[4] to the United States Constitution, and the Equal Protection Clause of the Fourteenth Amendment.[5] He brings the latter two claims pursuant to Title 42 U.S.C. § 1983.[6]

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[4] The First Amendment to the United States Constitution states as follows:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

[5] The Fourteenth Amendment to the United States Constitution states as follows:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

[6] 42 U.S.C. § 1983. Civil action for deprivation of rights.

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.

Boyd invokes the subject matter jurisdiction of this court pursuant to Title 28 U.S.C. § 1331[7], as this action arises under the Constitution and laws of the United States. All parties agree that this court has "federal question" subject matter jurisdiction.

I. FACTUAL BACKGROUND

Boyd was employed with the Mississippi Department of Public Safety ("MDPS") for the period beginning in December of 2000, until May 29, 2013. He is a male Caucasian. His first position was that of Trooper. He became a member of the Strategic Weapons and Tactics ("SWAT") team in 2007. In June, 2013, Boyd was promoted to Captain of Troop H, which is located in Meridian, Mississippi. His last rank with the MDPS was as a Captain.

According to Boyd's Amended Complaint, on March 26, 2015, he sent to some of his fellow officers and patrol members an email, listing fourteen grievances complaining of personnel decisions and issues, and calling for an end to certain practices, such as what he called "favoritism being conferred upon unqualified Black officers" [doc. no. 4 at p. 4]. The email was only sent to White officers, and was not sent to any of Boyd's supervisors. He sent on March 29, 2015,

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[7] § 1331. Federal Question

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

28 U.S.C. §1331.

another email, which stated that he did not want this endeavor to become a "witch hunt," did not want hatred or animosity, or to turn 'brother against brother." [doc. no. 33-1]. Boyd used a MDPS computer and the MDPS email system to send the emails. He sent the emails to the 'work' email addresses of the recipients.

Boyd's emails precipitated a quick response from the management of MDPS. Less than a fortnight thereafter, on April 8, 2015, Boyd was summoned to a meeting. Present were: Colonel Donnell Berry ("Berry"), Director of the Highway Patrol and Assistant Commissioner of MDPS, ("Berry"); Major Jimmy O'Banner; Lieutenant Colonel Kevin Myers;[8] and Albert Santa Cruz ("Santa Crux [sic]"), Commissioner of MDPS. Colonel Berry is African American. Commissioner Santa Cruz is White. Asked by these higher-ups to explain the emails, Boyd replied that troopers throughout the state had issues with the points he had raised. He also said he thought his correspondence was the proper way to figure out the issues troubling the troopers. In his deposition later given in this litigation, Boyd explains: "I'm in middle management with the highway—I was in middle management with the highway patrol. It's my job to pass stuff from below to up, from stuff up down." [doc. no. 33-1 p.30].

Boyd was called to another meeting in Jackson, Mississippi, on April 13, 2015, with Colonel Berry and

[8] The Court was unable to determine the race of these officers from the record. However, outside sources indicate that Major Jimmy O'Banner is African American and Lieutenant Colonel Kevin Myers is Caucasian.

Major O'Banner. At that meeting, the pair informed Boyd that he was being transferred from the position of Commander, Troop H Enforcement Division to Mississippi Bureau of Investigations, Troop H, Salvage Division. His rank of Captain would not change. According to Berry, Boyd was moved because his emails had caused some "racial ruckus" in that troop.

Later that same day, April 13, 2015, Boyd received an email removing him from the SWAT team. Berry said this action was taken because of the racial tension in that troop and because he [Berry] had heard that Boyd's fellow SWAT team members did not feel safe working with Boyd. [doc. no. 33-2 p.5].

In its position statement in response to Boyd's later charge of discrimination[9] filed with the Equal Employment Opportunity Commission ("EEOC"), sometime in August of 2015, MDPS reiterated the above reasons for its actions against Boyd: "The charging party [Boyd] engaged in activities that exhibited poor judgment and caused racial agitation within the department; as a result, he was removed from his supervisory responsibilities within his Troop, but did not suffer any loss of rank or monies." *EEOC Position Statement of Respondent* [doc. no. 33-2 p. 16].

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[9] An employee who seeks to recover under Title VII must first file a charge of discrimination with the Equal Employment Opportunity Commission ("EEOC"). There are time limits for filing the charge, usually 180 days. *Snider v. L-3 Communications Vertex Aerospace, LLC*, No. 3:09-CV-704-HTW-LRA, 2016 WL 3648281, at *3 (S.D. Miss. Mar. 15, 2016). Boyd filed his EEOC Complaint on August 21, 2015.

That same day, April 13, 2015, after the occurrence of the above-mentioned events, Boyd left Jackson, Mississippi, by car, and headed to his home in Meridian, Mississippi, a distance of some ninety-two (92) miles from Jackson, Mississippi. It was around noon. The day was cloudy and overcast with scattered showers. [doc. no. 33-1 p. 37]. The sole occupant in his official vehicle, Boyd took the most direct route and travelled on Interstate Highway I-20. The highway was wet from falling rain.

Boyd's deposition, given January 20, 2017, describes what happened next: he got into the right lane to pass a vehicle that was in the left lane; after passing it he says he moved back over into the left lane, and within a mile he topped a hill, hit some water and hydroplaned. His car spun around and he hit a guardrail at a 90-degree angle to the road [doc. no. 33-1 pp. 38-45]. He survived without serious injury, but the MDPS car he was driving was totaled. The data recorder pulled from Boyd's vehicle indicated that he had been traveling at or near 100 miles per hour at the time he lost control of his vehicle. *Narrative Statement of Charges*, [doc. no. 39-7 p. 4].

On November 18, 2014, some five months prior to Boyd's accident, Lieutenant Colonel Kevin Myers, Deputy Director, Mississippi Highway Safety Patrol, HSP, had sent all MDPS troopers a memorandum advising them that failure to operate a patrol vehicle in a safe

manner could constitute a Group III offense.[10] That memorandum also prohibited troopers from speeding in patrol cars unless responding to an emergency, and further stated that troopers must exercise due care for the safety of others in emergency situations. *Boyd Deposition* [doc. no. 33-1 at p. 56]. Boyd acknowledged receipt of this memorandum by his signature on the document dated December 10, 2014, and in his deposition given January 20, 2017. [doc. no. 33-1 at p. 65].

Allegedly, the memo was a direct result of an October, 2014, incident where an African American male trooper had wrecked his official vehicle while not responding to any emergency. That accident had caused the death of a motorist and injury to that trooper. When the injured officer later appeared at a Performance Review Board Hearing,[11] a panel found him in violation of Departmental policies and the officer was terminated. [doc. no. 33-2 p. 16].

As a result of his motor vehicle accident, Boyd was charged with a "violation of safety rules where there

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[10] The *Mississippi Department of Public Safety General Order Manual* provides:

> Commission of one (1) Group Three offense may be disciplined by a written reprimand and/or may result in suspension without pay up to thirty (30) working days, demotion, ***or dismissal***. Mississippi Department of Public Safety General Order Manual. General Order 9.03.04 B. [doc. no. 41-3 p. 2]. (emphasis added).

[11] When charges are filed against an MDPS officer, a Performance Review Board is convened, pursuant to departmental policy, to determine the validity of the charges. EEOC Position Statement of Respondent [doc. no. 39-7 p.1]

exist[ed] a threat to life or human safety." A Performance Review Board consisting of five other MDPS officers heard the charge against Boyd. Boyd was allowed to strike two members of the panel, and he did so. *Deposition of Patrick Boyd* [doc.no. 33-1 p. 45-47]. The Board afterwards determined that the charge against Boyd was well-taken. As a result, Berry, with the approval of Santa Cruz, terminated Boyd's employment, effective May 29, 2015. *EEOC Position Statement of Respondent* [doc. no. 39-7 p. 1].

Defendants claim that MDPS's disciplinary action against Boyd was entirely consistent with the punishment MDPS had meted out to Jonathan Johnson, the African American male trooper whose employment was also terminated following the above-mentioned motor vehicle accident, which occasioned a loss of life. Say the Defendants herein, Johnson had been driving at an extremely high rate of speed and his accident, too, had occurred during a non-emergency situation.

Aggrieved over his termination, Boyd filed a Charge of Discrimination with the EEOC on August 21, 2015. [doc. no. 33-1 pp. 70-72]. He claimed race discrimination. His charge before the EEOC states in pertinent part:

3.

> On April 13, 2015, Mississippi Highway Safety Patrol Colonel Donnell Berry issued orders relocating and transferring Your Charging Party from his position as Captain of Troop H in the enforcement Division to

Salvage in Troop H of the Bureau of Investigation Division and dismissed Your Charging Party from the Mississippi Highway Patrol S.W.A.T. Team. Colonel Donnell Berry is Black. Also at the time of the transfer the Lieutenant for Troop H was Malachi Sanders, also Black. After Your Charging Party's transfer, Malachi Sanders was promoted to Captain and Charles Coleman, who was a Black Master Sergeant for Driver Services in Troop M located in Brookhaven, Mississippi, was promoted to Lieutenant for Troop H.

4.

Colonel Donnell Berry transferred Your Charging Party because of his race, White, or Caucasian. Prior to the April 13, 2015 transfer, Your Charging Party published a list of troopers' grievances with the Mississippi Highway Safety Patrol. One of the substantial grievances Your Charging Party published by internet was favoritism by Colonel Donnell Berry, who is in charge of promotions, for Black troopers who were promoted in violation of Mississippi Highway Safety Patrol policy requiring testing for positions, refusing to give qualified Whites or Caucasians promotions for positions while at the same time giving promotions for the positions to lesser qualified Blacks, and inconsistency by disciplining Whites for relatively minor infractions and not imposing any discipline whatsoever upon Black troopers for worse infractions.

5.

On May 29 2015, Colonel Berry issued orders terminating the employment of Your Charging Party due to speeding which Colonel Berry had classified as a Group III (fireable offense), when in truth and fact is specifically covered under a Group I Offense (reprimandable offense). No discipline whatsoever has been meted out to any trooper for speeding. Black and White Mississippi Highway Safety Patrol troopers known by Donnell Berry to drive well in excess of the speed limit have not been disciplined. The termination also was because of Your Charging Party's race, White or Caucasian.

6.

The grievances which complain in substantial part about racially disparate working conditions, also concern other deficiencies in terms and conditions of employment not concerning race. As such, Your Charging Party also was transferred and then terminated in violation of his rights under the First Amendment of the United States Constitution, which amendment allows him to speak out on matters of public and trooper concern, when such speech causes no disruption to the Mississippi Highway Safety Patrol, without being subject to any acts of retaliation, such as demotion and termination.

7.

> Your Charging Party has been discriminated against on the basis of race, White, first by being transferred for complaining about racially disparate terms and conditions of employment and, second, by being fired or terminated from his job for speeding, when no Mississippi Highway Safety Patrol trooper in the past has been even disciplined for only speeding. As such, Your Charging Party has suffered lost pay, loss of fringe benefits, and, ultimately, a smaller pension, with pension payments being based upon the highest four years of salary. Your charging Party has also undergone severe mental anguish and emotional distress and is entitled to damages therefor. Your Charging Party is also entitled to his attorney's fees.

EEOC Charge of Discrimination [doc. no. 33-1 pp. 10-72]. Boyd named the Mississippi Highway Safety Patrol as the Respondent, which is a division of the MDPS.

Following its investigation, the EEOC issued its determination that it was unable to conclude that Defendants had violated any statutes and issued Boyd his 'right to sue' letter,[12] dated December 18, 2015. [doc. no.

[12] A "right to sue letter" is a letter issued by the United States Department of Justice. The purpose of the letter is to inform the claimant who has made a charge of discrimination that the EEOC has completed its investigatory and/or conciliatory activities with regard to the claimant's charges; that the Department of Justice will not file a lawsuit on behalf of the claimant; and that the claimant has ninety days from receipt of the right to

33-1 p. 73] Boyd commenced this lawsuit on March 9, 2016. He is suing his past employer, MDPS, and the following persons in both their individual and official capacities: Albert Santa Cruz, Commissioner of MDPS; and Donnell Berry, Director of the Mississippi Highway Patrol and Assistant Commissioner of MDPS. As earlier mentioned, Santa Cruz is White/Caucasian, and Berry is Black/African American. Santa Cruz is Berry's superior.

II. LEGAL STANDARD

Summary judgment is appropriate if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Fed. R. Civ. P. 56(a)*; *Copeland v. Nunan*, 250 F.3d 743 (5th Cir. 2001); see also *Wyatt v. Hunt Plywood Company, Inc.*, 297 F.3d 405, 408–09 (2002). When assessing whether a dispute as to any material fact exists, the court must consider all of the evidence in the record, but the court must refrain from making credibility determinations or weighing the evidence. *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000); instead, we "draw all reasonable inferences in favor of

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sue letter to file his/her own lawsuit. Receipt of the Right to Sue letter is a prerequisite to filing a lawsuit based on an EEOC Charge of Discrimination. See *Snider v. L-3 Communications Vertex Aerospace, LLC*, No. 3:09-CV-704-HTW-LRA, 2016 WL 3648281, at *3 (S.D. Miss. Mar. 15, 2016). See 29 C.F.R. §1601.28.

the nonmoving party." *Id*.; *Wyatt*, 297 F.3d at 409. All evidence and the reasonable inferences to be drawn therefrom must be viewed in the light most favorable to the party opposing the motion. *United States v. Diebold, Inc*. 369 U.S. 654, 655 (1962).

A party, however, cannot defeat summary judgment with conclusory allegations, unsubstantiated assertions, or "only a scintilla of evidence." *TIG Ins. Co. v. Sedgwick James of Wash. 276 F.3d 754, 759 (5th Cir. 2002)*; *S.E.C. v. Recile, 10 F.3d 1093, 1097 (5th Cir. 1997)*; *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir.1994). Summary judgment is appropriate if a reasonable jury could not return a verdict for the nonmoving party. *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

The standard for granting summary judgment in Title VII cases is succinctly stated in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 148 (2000). In the recent Fifth Circuit case of *Bennett v. Consol. Gravity Drainage Dist. no. 1*, the Court, quoting *Reeves v. Sanderson*, held: "whether summary judgment is appropriate" once an employee raises a triable issue as to pretext "depends on numerous factors, including 'the strength of the Plaintiff's prima facie case, the probative value of the proof that the employers' explanation is false, and any other evidence that supports the employer's case and that properly may be considered.' *Bennett v. Consol. Gravity Drainage Dist. No.1*, 648 F. Appx. 425, 432 (5th Cir. 2016).

III. LEGAL ANALYSIS

A. TITLE VII CLAIM AGAINST MISSISSIPPI DEPARTMENT OF PUBLIC SAFETY

A race discrimination claim brought under Title VII is governed by the familiar *McDonnell Douglas* burden shifting framework. *LeMaire v. La. Dept. of Transportation & Dev*., 480 F.3d 383, 388 (5th Cir. 2007) (*quoting McDonnell Douglas Corp. v. Green*, 411 U.S. 793 (1973). See also, *Harris v. v. Mississippi Transp. Comm'n*, 329 Fed. Appx. 550 (2009). *McDonnell Douglas Corp. v. Green*, at 802-05 (1973), establishes a three-step, circumstantial[13] evidentiary process to show discrimination.

> ***First***, the plaintiff has the burden of proving by a preponderance of the evidence a prima facie case[14] of discrimination. ***Second***, if the plaintiff succeeds in proving the prima facie case, the burden shifts to the defendant to articulate some legitimate, nondiscriminatory reason for the employee's rejection. ***Third***, should the defendant carry the burden, the plaintiff must have an opportunity to prove by a preponderance of the evidence that the

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[13] Note that the McDonnell Douglas proof scheme addresses an evidentiary process which relies upon circumstantial evidence, the usual evidentiary approach to these matters. Seldom, if ever, does the court see litigation founded upon direct evidence, such as an admission.

[14] *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248,260 n. 7 (1981), defines "prima facie case" in the Title VII context as "the establishment of a legally mandatory, rebuttable presumption."

> legitimate reasons offered by the plaintiff were not its true reasons, but were a pretext for discrimination.

Id. at 802. (emphasis added).

As stated above, a complainant in a Title VII case must carry the initial burden of establishing a prima facie case of racial discrimination. This may be done by showing: i) he is a member of a protected class; ii) he was qualified for the position; iii) he was subjected to an adverse employment action; and iv) he was replaced by someone outside Plaintiff's protected class, or other similarly situated employees were treated more favorably. *Bryan v. McKinsey & Co., Inc.*, 375 F.3d 358, 360 (5th Cir. 2004) (citing *Okoye v. University of Texas Houston Health Science Ctr.*, 245 F.3d 507, 512 (5th Cir. 2001). The United States Supreme Court, in *McDonnell*, added that facts will vary in Title VII cases; thus the prima facie proof required may differ in differing factual situations." *Id.*, at 802, n. 13; See also *Swierkiewicz v. Sorema N.A.,* 534 U.S. 506 (2002).

Assuming, arguendo, that Boyd makes out a prima facie case for discrimination, MDPS has the burden to articulate a legitimate, non-discriminatory reason for the action taken. *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981). Defendants here claim they have met their production burden of articulating a non-discriminatory reason for Boyd's termination. Boyd, say Defendants, was fired, after notice and a hearing before an impartial review panel, for

"violation of safety rules where there existed[ed] a threat to life or human safety."

The third McDonnell factor requires a shifting of the production burden back to the Plaintiff, who must show that the employer's provided reason was but a pretext for discrimination. Boyd hopes his retort will satisfy that production obligation.

Boyd does not deny that his accident was directly caused by his dangerous conduct—that he drove at speeds of up to 100 miles per hour in rainy and wet conditions in a non-emergency situation; but he contends that because he did not injure or kill anyone, Defendants have failed to make a case for his termination based upon a comparator. Boyd states repeatedly, both in his deposition and in his response to the motion for summary judgment, that no trooper had ever previously been fired by MDPS simply for speeding.[15]

Boyd, though, was not fired simply for speeding; he was fired for violating MDPS General Order 9.03.04 B 3 g:

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[15] Plaintiff, despite submitting hundreds of pages of troopers' accident reports does not specifically indicate the comparables. Included are a variety of accidents, ranging from fender benders on parking lots to serious wrecks occurring during emergency situations with lights and sirens activated. Apparently, Plaintiff expects the court to scour these hundreds of pages and find "a needle in a haystack." "Rule 56 does not impose upon the district court a duty to sift through the record in search of evidence to support a party's opposition to summary judgment." *Adams v. Travelers Indem. Co. of Conn.*, 465 F.3d 156, 164 (5th Cir.2006)."

> 3. Group Three Offenses
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> Commission of one (1) Group Three offense may be disciplined by a written reprimand and/or may result in suspension without pay up to thirty (30) working days, demotion, or dismissal.
>
> Group Three Offenses include but are not limited to the following:
>
> . . .
>
> g. Violation of safety rules where there exists a threat to life or human safety.
>
> . . .

Mississippi Department of Public Safety General Order Manual, [doc. no. 41-3 p. 2].

As he admits in his deposition testimony: the undisputed facts here show that Boyd raced his official car down a highway covered with falling rain that at any point could cause slickness and hydroplaning, especially when, under that unsafe condition, he was pushing the car at a high rate of speed, far in excess of the legal speed limit, approaching an incline in the road, and attempting to change lanes. His imprudent action was not occasioned by any emergency, or police business, only his desire to reach his home destination quickly. During his dangerous driving, he passed an innocent motorist, who could have been a victim of his [Boyd's] reckless behavior, speeding under treacherous conditions at or near 100 miles per hour, according to his car's data recorder. Luckily, Boyd survived the

accident; his official car did not, since after it spun and hit a guardrail at a ninety-degree angle, it was rendered a total loss. Certainly, Boyd's non-emergency driving created a threat to life or human safety, the lives of others, as well as a threat to his own.

After the October, 2014 wreck which caused the death of a civilian, troopers were warned, in the November 18, 2014, memo referenced earlier, that the treatment of speeding/accidents in non-emergency situations would be taken seriously, could be treated as a Group Three Offense, and could result in termination. Boyd cannot say that he had not been warned.

Even if it is assumed that Boyd established a prima facie case of discrimination, that case dissolved in the face of the employer's legitimately-stated reason, requiring Boyd to produce evidence that the stated reason was pretextual. Boyd has not demonstrated that the stated reason for his termination was a pretext for race discrimination, or that his race was a motivating factor in his termination.

Boyd also cannot demonstrate that the actions of his employer were retaliatory. As discussed earlier, this court is persuaded that Boyd's termination was not based on race or retaliation. Similarly, Boyd's transfer to a different unit and his transfer out of the SWAT unit were not based on race or retaliation.

Title VII retaliation claims require proof that the desire to retaliate was the 'but for' cause of the challenged employment action. S*ee Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 133 S.Ct. 2517, 2528, 186

L.Ed.2d 503 (2013). Temporal proximity alone is not sufficient to establish 'but for' causation for purposes of demonstrating retaliation. *McCullough v. Houston County, Texas*, 297 Fed. Appx. 282 (5th Cir. 2008) (citing *Strong v. University Healthcare System, L.L.C.*, 482 F.3d 802 (5th Cir. 2007)) (without more than timing allegations, summary judgment in favor of the defendant was proper); *Clark County School District v. Breeden*, 532 U.S. 268, 273 (2001) ("we affirmatively reject the notion that temporal proximity, standing alone, can be sufficient proof of but for causation").

B. 42 U.S.C. § 1983 CLAIMS AGAINST SANTA CRUZ AND BERRY

Whereas Boyd's Title VII claim is brought against his employer, he also brings an action against Donnell Berry and Albert Santa Cruz in both their individual and official capacities, under Title 42 U.S.C. § 1983. Section 1983 provides that every 'person' who, under color of law, deprives persons of federal rights is liable for such deprivation. A state or state agency is not a 'person' within the meaning of the statute and, thus cannot be sued under § 1983. A suit for money damages also cannot be brought under § 1983 against a state official in his or her *official* capacity. Boyd seeks monetary damages from Berry and Santa Cruz in their *individual* capacities and he seeks injunctive and declaratory relief from these defendants in their *official* capacities.

The United States Supreme Court describes the distinction between personal and official capacity suits as follows:

> Personal-capacity suits seek to impose personal liability upon a government official for actions he takes under color of state law. See e.g., *Scheur v. Rhodes*, 416 U.S. 232, 237-38 (1974). By contrast, official capacity suits "generally represent only another way of pleading an action against an entity of which an officer is an agent." *Monell v. New York City Dept. of Social Services*, 436 U.S. 658,690, n. 55 (1978).

Kentucky v. Graham, 105 S.Ct. 3099, 3105 (1985). "Thus", the Court continued, "while an award of damages against an official in his personal capacity can be executed only against the official's personal assets, a plaintiff seeking to recover on a damages judgement in an official-capacity suit must look to the government entity itself. *Id.* at 3105.

1. Qualified Immunity and the Individual Capacity Claims for Damages

When public officials are sued for money damages under § 1983 in their 'individual' or 'personal' capacities, they enjoy qualified immunity for their objectively reasonable acts. Under qualified immunity, officials are not subject to damages liability for the performance of their discretionary function when their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person

would have known. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

"Qualified immunity shields federal and state officials from money damages unless a plaintiff pleads facts showing (1) that the official violated a statutory or constitutional right, and (2) that the right was 'clearly established' at the time of the challenged conduct." *Ashcroft v. al-Kidd*, 563 U.S. 731, 735 (2011); *Lane v. Franks*, 134 S. Ct. 2369, 2381, 189 L. Ed. 2d 312 (2014); *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982); *Howell v. Town of Ball*, 827 F.3d 515 (5th Cir. 2016). "Courts may address these two elements in either order, and need not proceed to the second where the first is resolved in the negative." *Bryant v. Texas Dept. of Aging and Disability Services*, 781 F.3d 764, 770 (2015) (quoting; *Thompson v. Mercer*, 762 F.3d 433, 437 (5th Cir.2014)); *Ashcroft v. al-Kidd* at 735 (citing *Pearson v. Callahan*, 555 U.S. 223, 236 (2009))

With respect to what constitutes "clearly established" law, the Supreme Court stated the following:

> The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, but it is to say that in the light of preexisting law the unlawfulness must be apparent.

Anderson v. Creighton, 483 U.S. 635, 639-40 (1987). See also *Malley v. Briggs*, 475 U.S. 335, 340(1986).

Qualified Immunity is a question of law to be decided by the court. See *Hunter v. Bryant*, 502 U.S. 224, 228 (1991) (per curiam) (qualified immunity issue is question for court and ordinarily should be decided long before trial). The purpose of qualified immunity is not simply to immunize a public official from liability, but to immunize that official from the expense and distraction caused by the litigation itself, *Id.* at 816, 827, and to avoid chilling the actions of state actors who might be intimidated by the prospect of a federal lawsuit with regard to the exercise of their duties. As stated by the Court of Appeals for the Eleventh Circuit, this doctrine "balances society's interest in providing a remedy for injured victims and discouraging unlawful conduct with that of enabling public officials to act independently and without fear of consequences." *Hardin v. Hayes*, 957 F.2d 845, 848 (11th Cir. 1992). Qualified immunity is necessary if government officials are to be allowed to do their jobs without undue fear of personal liability for wrong choices, though reasonably made. As stated in *Ashcroft v. Al-Kidd*, "[q]ualified immunity gives government officials breathing room to make reasonable but mistaken judgments about open legal questions." *Id*. at 743.

In the Fifth Circuit case of *King v. Handorf*, the Court stated, "[t]he doctrine of qualified immunity protects government officials from civil damages liability when their actions could reasonably have been believed to be legal." *King v. Handorf, 821 F.3d 650, 653*

(5th Cir. 2016) (quoting *Morgan v. Swanson*, 659 F.3d 359, 370 (5th Cir. 2011). Qualified immunity is an affirmative defense, and once properly raised, the plaintiff has the burden to negate the assertion of qualified immunity. *Collier v. Montgomery*, 569 F.3d 214, 217 (5th Cir. 2009).

The defendant's assertion of qualified immunity, when made in good faith, alters the usual summary judgment burden of proof, shifting it to the plaintiff to show that the defense is not available. *King v. Handorf, at 653-54*; See also *Cass v. City of Abilene*, 814 F.3d at 728 (quoting *Trent v. Wade*, 776 F.3d 368, 376 (5th Cir.2015)); *Gates v. Tex. Dep't of Protective & Regulatory Servs.*, 537 F.3d 404, 419 (5th Cir. 2008) (plaintiff must rebut the defense by establishing that the official's allegedly wrongful conduct violated clearly established law and that genuine issues of material fact exist regarding the reasonableness of the official's conduct). The plaintiff need not present 'absolute proof,' but must offer more than 'mere allegations' to negate a qualified immunity defense." *Manis v. Lawson*, 585 F.3d 839, 843 (5th Cir.2009).

Boyd contends that by transferring him out of his regular division and terminating him Santa Cruz and Berry violated his rights under the First and Fourteenth Amendments to the United States Constitution and under Title VII.

As discussed later in greater detail, this court is persuaded that none of the Defendants violated Boyd's constitutional rights under the First or Fourteenth

Amendment as he alleges, or his statutory rights under Title VII; thus, the individual or personal claims against Berry and Santa Cruz are barred by qualified immunity. *Plumhoff v. Rickard*, ___ U.S. ___, 134 S.Ct. 2012, 188 L.Ed.2d 1056 (2014).

In *Saucier v. Katz*, the United States Supreme Court established a two-step protocol for determining whether public officials were entitled to qualified immunity. *Saucier v. Katz, 533 U.S. 194,201 (2001).* The first query under the *Saucier* analysis is whether the facts, when viewed in the light most favorable to the Plaintiff, establish that the official's conduct violated a protected right. *Id.* at 201. Based on its analysis of these issues, and viewed in the light most favorable to the Plaintiff, this court is persuaded that Boyd's rights have not been violated. If no rights were violated, the qualified immunity analysis comes to a quick end, and the Plaintiff's claims must be dismissed.

If the facts do show a violation of a right, the second inquiry in the qualified immunity analysis asks "whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Id.* at 202. An official is entitled to immunity as long as he acted reasonably and even if he ultimately was wrong about the legality of his actions. The right must be so clearly established that any reasonable official in the Defendants' shoes would have understood that he was violating it. *Id.*; See also *Boisseau v. Town of Walls, Mississippi* 138 F.Supp.3d 792 (N.D. Miss. 2015).

The United States Supreme Court in *Pearson v. Callahan*, 555 U.S. 223, 235-6 (2009), reevaluated the *Saucier* procedure and determined that it is no longer mandatory to determine whether a constitutional right has been violated before proceeding to the "clearly established" prong. The Court reasoned, "[t]here are cases in which it is plain that a constitutional right is not clearly established but far from obvious whether in fact there is such a right." *Id*. at 236. Such a constitutional analysis, which ultimately proves to be unnecessary, "disserve[s] the purpose of qualified immunity" by causing the parties to endure additional 'burdens of suit.' *Id.* at 237. After *Pearson*, use of the two-step procedure is discretionary, not mandatory, and the courts may exercise discretion in deciding which of the two prongs should be addressed first in light of the particular circumstances present. After examining both prongs of the test, this court is persuaded that Berry and Santa Cruz are entitled to qualified immunity.

The objective reasonableness standard bars all claims against Berry and Santa Cruz individually, unless it can be said that "*every* reasonable official would understand that what he is doing violates [the law]." *Morgan v Swanson*, 659 F.3d 359, 371 (5th Cir. 2011) (emphasis in original) *reversed and remanded on other grounds by Fifth Circuit en banc* at *Morgan v. Swanson*, 755 F.3d 757 (5th Cir. 2014); see *Pearson v. Callahan*, 555 U.S. 223, 226 (2009); *Keenan v. Tejeda*, 290 F.3d 252, 261 (5th Cir. 2002) (citing *Saucier v. Katz* at 202). Berry and Santa Cruz are entitled to immunity

in this circumstance and the court grants summary judgment in their favor as to the claims for damages against them individually.

2. Official Capacity Claims for Equitable Relief

Boyd contends that the actions of these Defendants in transferring and terminating him constitute violations of: 1) the Equal Protection Clause of the Fourteenth Amendment, 2) the Free Speech Clause of the First Amendment, 3) Right to Free Association as guaranteed by the First Amendment, and 4) the Right to Petition for Redress of Grievances as guaranteed by the First Amendment to the United States Constitution, by and through 42 U.S.C.§ 1983. He is suing these Defendants in their 'official' capacities for a declaratory judgment that the actions of the Defendants were in violation of settled law, and an injunction ordering reinstatement of Plaintiff to his former position.

a. Equal Protection

An employment discrimination claim brought under 42 U.S.C. §1983 for violation of the Fourteenth Amendment is analyzed under the same evidentiary framework as Title VII actions. That framework discussed earlier manifests that the inquiry into intentional discrimination is essentially the same for individual actions brought under §1983 and Title VII." *Lauderdale v. Tex. Dep't of Criminal Justice, Inst'al Div.*, 512 F.3d 157, 166 (5th Cir.2007) (quoted in *Saucedo-Falls v.*

Kunkle, 299 F. App'x 315, 323 (5th Cir. 2008)). *Lawrence v. Univ. of Texas Med. Branch*, 163 F.3d 302, 311 (5th Cir. 1999); *Saucedo-Falls v. Kunckle* [sic], 299 Fed. Appx. 315, 323 (5th Cir. 2008).

"The Equal Protection Clause of the Fourteenth Amendment "is essentially a direction that all persons similarly situated should be treated alike." *Lawrence v. Texas*, 539 U.S. 558 (2003) (citing *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 439, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985); see also *Plyler v. Doe,* 457 U.S. 202, 216, 102 S.Ct. 2382, 72 L.Ed.2d 786 (1982); and *Engquist v Oregon Dept. of Agriculture*, 553 U.S. 591, 128 S.Ct. 2146 (2008). The United States Supreme Court has held that the equal protection clause only prohibits intentional discrimination. *Ricci v. DeStefano*, 557 U.S. 557, 129 S.Ct. 2658 (2009). To state a viable claim under the Equal Protection Clause, as with Title VII, there must be proof that the governmental official was motivated by intentional discrimination. *Coleman v. Houston Indep. Sch. Dist.* 113 F.3d 528, 533 (5th Cir. 1997) (citing *Washington v. Davis,* 426 U.S. 229, 240-42 (1976); *Vera v. Tue*, 73 F.3d 604, 609 (5th Cir. 1996).

Boyd does not have any direct evidence of intentional discrimination, but contends there is sufficient circumstantial evidence to establish intentional discrimination. This court disagrees. *Byers v. Dall. Morning News, Inc.*, 209 F.3d 419,427 (5th Cir. 2000). Rule 56 mandates the entry of summary judgment "against a party who fails to make a sufficient showing to establish the existence of an element essential to that party's case, and on which that party will bear the

burden of proof at trial." *Celotex Corp. v. Catlett*, 477 U.S. 317, 322 (1986).

This court is persuaded that summary judgment should be entered in favor of Santa Cruz and Berry on Boyd's equal protection claims since he has no proof that these governmental officials were motivated by intentional discrimination. Boyd acknowledges that he violated General Order safety rule 9.03.04B.3g. He could have injured or killed himself and another motorist on the road, while destroying his official vehicle, and while driving at an inexcusable speed for no official reason.

b. First Amendment Free Speech, Free Association and Right to Petition for Redress

i. Free Speech

This court now examines Boyd's claim pursuant to §1983 that Berry and Santa Cruz violated his constitutional rights to Free speech. In *Howell v. Town of Ball*, the Fifth Circuit Court of Appeals reiterated the court's long-employed four-prong test for determining whether certain speech of public employees is entitled to constitutional protection. A plaintiff must establish that: "(1) he suffered an adverse employment decision; (2) his speech involved a matter of public concern; (3) his interest in speaking outweighed the governmental defendant's interest in promoting efficiency; and (4) the protected speech motivated the defendant's conduct. *Howell v. Town of Ball*, 827 F.3d 515 (5th Cir.

2016). See also *Lukan v. N. Forest Index. Sch. Dist.*, 183 F.3d 342, 346 (5th Cir. 1999).

Boyd complains that his transfer, as well as his termination, were in violation of his right of Free Speech. The first element Boyd must show is whether he suffered an adverse employment action. Termination is, of course, an adverse employment action. Since Boyd's transfer to a different troop and his removal from the SWAT team did not result in a loss of pay or rank, Defendants claim it was not an adverse employment action. It is not necessary to decide this issue, since this claim fails for other reasons, as further discussed below.

Boyd must next show that his speech involved a matter of "public concern." *Brawner v. City of Richardson, Tex*. 855 F.2d 178, 191 (5th Cir. 1988). What is speech of public concern? [*Garcetti*] *v. Ceballos*, 547 U.S. 410 (2006), says it is *not* work-related speech made by public employees. The United States Supreme Court therein stated, "[w]hen public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communication from discipline." *Id*. at 421. See also, *Jordan v. Ector County*, 516 F.3d 290, 294–95 (5th Cir.2008); under such situations, he is speaking as an employee and his speech is not protected by the First Amendment. *Lane v. Franks*, ___ U.S. ___, 134 S.Ct. 2369, 2378 (2014) (citing *Garcetti v. Ceballos*, 547 U.S. 410, 421, 126 S.Ct. 1951, 164 L.Ed.2d 689 (2006)).

Later cases have further defined what constitutes speech made pursuant to official duties, i.e., if it is required by one's position, or undertaken in the course of performing one's job. *Haverda v. Hays Cnty.*, 723 F.3d 586, 598 (5th Cir. 2013) (*citing Williams v. Dallas Indep. Sch. Dist.*, 480 F.3d 689, 693 (5th Cir. 2007)). Relevant considerations in making this determination include "the employee's job description, whether the employee spoke on the subject matter of his employment, whether the speech stemmed from special knowledge gained as an employee, and whether the communication was internal or external in nature." *Ezell v. Wells*, No. 2:15-CV-00083-J, 2015 WL 4191751, at *9-10 (N.D. Tex. July 10, 2015) (citing *Charles v. Grief*, 522 F.3d 508, 513–14 (5th Cir. 2008), and *Davis v. McKinney*, 518 F.3d 304, 313 (5th Cir. 2008). In sum, the court must answer, as a matter of law, if the speech addresses a matter of public concern after examining the "content, form, and context of a given statement, as revealed by the whole record." *Connick v. Myers*, 461 U.S. 138, 147–48 & n. 7 (1983).

Boyd, himself, at one point says he considered his correspondence a part of his official duties. His deposition testimony confirms this point. He testified that he considered it part of his job as middle management to pass things "from below up." (this assertion is challenged by the identity of his addressees: not one was his supervisor). Boyd used a MDPS computer and the MDPS email system to compose and send the emails, which were sent only to MDPS White employees at their MDPS email addresses. The subject emails dealt

only with personnel issues within MDPS. The first email made it clear that the issues concerned the "negative effect they have had *on the patrol*." [doc. no. 33-1] (emphasis added). No reference was made in either of the two emails to any concerns for any impact on the public at large. Additionally, he did not make his concerns public. The emails were only sent to certain of his fellow troopers, namely White patrol officers. *Sanders v. Leake County School District*, 2008 WL 682416 (S.D. Miss. March 7, 2008).

This court is persuaded, as a matter of law, that Boyd's speech, in the form of emails to his white co-workers, does *not* qualify as a matter of public concern. As the federal district court said of the police officer Plaintiff in *Graziosi v. City of Greenville*, the statements were made from the perspective of a disgruntled officer, not a concerned citizen. *Id*., 985 F.Supp.2d 808 (2013). Boyd's conduct here exemplifies the same characteristics.

Furthermore, even if the speech is found to be a matter of public concern, this court would then have to make inquiry into the third prong of the four-prong test under *Howell v. Town of Ball* for determining whether the speech of public employees is entitled to constitutional protection. As discussed earlier, plaintiff must establish that: "(1) he suffered an adverse employment decision; (2) his speech involved a matter of public concern; (3) his interest in speaking outweighed the governmental defendant's interest in promoting efficiency; and (4) the protected speech motivated the defendant's conduct. *Howell v. Town of Ball*, 827 F.3d

515 (5th Cir. 2016). See also *Lukan v.* [*North*] *Forest* [*Indep.*] *Sch. Dist.*, 183 F.3d 342, 346 (5th Cir. 1999).

This court is persuaded that Boyd cannot make the requisite showing for that third prong. He would not be able to demonstrate that his interest in speaking outweighed the MDPS's interest in promoting efficiency. See also *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968). In performing this balancing test, the court looks at whether the statement impairs discipline by superiors or harmony among co-workers, has a detrimental impact on close working relationships for which personal loyalty and confidence are necessary, or impedes the performance of the speaker's duties or interferes with the regular operation of the enterprise." *Rankin v. McPherson*, 483 U.S. 378, 388, 107 S.Ct. 2891, 97 L.Ed.2d 315 (1987) (quoting *Pickering v. Board of Education*, at 570).

Boyd's comments did all of these things. The Department of Public Safety, particularly the Mississippi Highway Patrol, is an organization dependent upon close personal loyalty and confidence. The nature of the emails and the fact that they were only sent to white troopers, were certain to impair harmony among co-workers and have a detrimental impact on the close working relationships necessary for an effective organization. Such communication would not only impair Boyd's ability to do his job, but would also interfere with the regular operation of the organization. It was Berry's testimony that Boyd's actions had caused a "racial ruckus" within his troop and that members of the

SWAT team did not feel safe working with him [doc. no. 33-2 at p.5].

From the outset, Boyd knew the emails could cause some strife among the troopers. He said in the first email that, if publicized (signifying that Boyd did not necessarily want the email to become a public document), it could be viewed as "infighting." After he sent the first email, Boyd was apparently made aware that it had created some tensions, because his second email attempted to address the animosity created. He tried to clarify that the blame should be placed on the administration and not on other (presumably, African American) officers. It states: "I don't believe it does the patrol as a whole any good if we have hatred or animosity amongst one another. The whole point of this is to shine a light on the administration[']s biased or wrong decisions, not turn brother against brother." [doc. no. 33-1 p. 60].

This court concludes that Boyd's Free Speech claim has no evidentiary or legal support. His 'speech' was not a matter of public concern. Further, as discussed earlier, this court finds that the Defendants acted under General Order 9.03.04 B3g, and not pursuant to any thrust to affect Boyd's Constitutional right to exercise free speech.

We turn next to Boyd's allegations in his Amended Complaint that his right to free association and the right to petition for redress under the First Amendment were violated. Boyd asserts that the Defendants have confessed his claims regarding these issues

because they cite no authority in their memorandum regarding these claims. Boyd, however, does not present cogent evidence pertaining to these issues. He does not assert how his right of free association was compromised; nor does he state how his right to petition grievances was thwarted.

ii. Right to Petition for Redress of Grievances

Boyd also contends that his right to petition for redress of grievances pursuant to the First Amendment was violated. The United States Supreme Court, in *Borough of Duryea, Pennsylvania v. Guarnieri*, held that the close connection between the Free Speech clause and the Petition Clause has led Courts of Appeals other than the Third Circuit to apply the 'public concern' test developed in Speech Clause cases to Petition Clause claims by public employees. Id., 564 U.S. 379, 389, 131 S.Ct. 2488, 2495 (2011). The substantial government interests that justify a cautious and restrained approach to protecting public employees' speech, the Court said, are just as relevant in Petition Clause cases. *Borough of Duryea*, 564 U.S. at 389, 131 S.Ct. at 2495. Boyd's claim for violation of his right to petition for redress of grievances must go the way of his claim for violation of his right of free speech. To the extent that there was a petition for redress, as with his "speech," it was not a matter of 'public concern,' as this court has previously discussed.

iii. Freedom of Association

This court must next examine Boyd's contention that he was also retaliated against in violation of his right under the First Amendment to freedom of association. When, as here, "a plaintiff's claims arise under both freedom of speech and freedom of association, . . . the freedom of association claims are analyzed under the same *Pickering* balancing test used to determine the success of the freedom of speech claims." *Anderson v. Pasadena Indep. Sch. Dist.*, 184 F.3d 439, 444 (5th Cir.1999) (citing *O'Hare Truck Serv., Inc. v. City of Northlake*, 518 U.S. 712, 116 S.Ct. 2353, 135 L.Ed.2d 874 (1996)). That test balances the plaintiff's interest in speaking out against the interest of the public entity in promoting efficiency. See *Pickering v. Board of Education*, 391 U.S. 563, 568-70 (1968). In the Fifth Circuit, a claim predicated on the right to free association, however, unlike a claim predicated upon freedom of speech or right to petition for redress of grievances, does not require a showing that the associational activity touched upon a matter of 'public concern.' *Breaux v. City of Garland*, 205 F.3d 150, 157 n. 12 (5th Cir.2000) (citing *Boddie v. City of Garland, Miss.*, 989 F.2d 745, 747 (5th Cir.1993)).

Boddie v. City of Columbus, Miss, 989 F.2d 745 (5th Cir. 1993), involved a firefighter who was allegedly terminated for association with union members. In that case, the Fifth Circuit reiterated its position that free association claims need not be based on matters of public concern, stating:

> In *Coughlin v. Lee*, 946 F.2d 1152, 1158 (5th Cir.1991), we stated that "[a] public employee's claim that he has been discharged for his political affiliation in violation of his right to freely associate is not subject to the threshold public concern requirement." *See also Kinsey v. Salado Independent School Dist.*, 950 F.2d 988, 992–93 (5th Cir.1992) (en banc).

Boddie v. City of Columbus, Miss., 989 F.2d 745, 747 (5th Cir. 1993).

The decision in *Boddie* turned largely on the Court's finding that, at the time of Boddie's firing, the law was clear that an employee had a right to associate with a union, based on Fifth Circuit precedent. *Id*. at 748-49 (citing *Professional Ass'n of College Educators, TSTA/NEA* v. *El Paso County Community College Dist*., 730 F.2d 258, 261 (1984)).

The *Boddie* Court turned next to the issue of whether Boddie's association with union firemen was "a substantial motivating factor" in the decision to fire him. *Id.* at 750. See *Mt. Healthy City School Dist. Bd. of Education v. Doyle*, 429 U.S. 274, 97 S.Ct. 568, 50 L.Ed.2d 471 (1977). Contrary to the case *sub judice*, in *Boddie* there was ample evidence presented, both that the stated reason for Boddie's termination was pretextual, and that his association with union firefighters was a substantial or motivating factor in his termination.

The stated reason for Boddie's termination according to Chief Gale, the person alleged to have fired him,

was his poor attitude, as demonstrated by a few instances, including: losing his turnout coat and not paying for the replacement; being out of uniform on several occasions, and signing a petition concerning work hours after only being on the job for three months. The firemen who worked on Boddie's shift, his immediate superior and the assistant chief, all contradicted Chief Gale's testimony, saying Boddie was a very good firefighter, did not have an attitude problem, and there was no documentation of any poor performance as would normally be the case before a firefighter was terminated.

On the other hand, there was ample testimony regarding Chief Gales' motives. There was testimony from several persons that Chief Gale made such statements as: Boddie "hung out with the wrong crowd;" that Boddie had been "messing with the union;" that any union causes "turmoil;" that the union was only good for "protecting worthless workers." *Boddie* at 750-51. Chief Gale allegedly told another firefighter it was "not his job performance that was going to get him in trouble but his union activity . . . " To another, he stated that his "extracurricular activity" was going to get him in trouble. *Id., at* 750-51.

Contrasting the instant case, Boyd has made no showing that the reason for his termination was pretextual (Boyd admits wrecking his car while speeding), or that his association (which Boyd has yet to define) was a substantial reason for termination. There is no allegation of thwarted union association or participation in the instant case. Boyd has not offered any

specifics of what constitutes a violation of his right to freedom of association, and no proof thereof.

Accordingly, this court is not persuaded that Boyd has made any factual averments regarding these issues sufficient to create a material issue of fact. For all of the reasons stated, this court must grant summary judgment to Defendants in regard to Boyd's claims of violation of his rights under the First Amendment.

I. CONCLUSION

This court has examined the record, the submissions of the parties, and the relevant law in connection with the Defendants' motion for summary judgment. This court also conducted a hearing on this matter and heard arguments from both sides. Having performed an analysis of all of Plaintiff's claims, and having viewed the evidence in the light most favorable to him, this court has determined that there are no issues of material fact in dispute and Defendants are entitled to a grant of summary judgment on all of Plaintiff's claims. For all of the reasons stated, Defendants' motion for summary judgment **[doc. no. 33]** is hereby granted and this case is dismissed, with prejudice.

SO ORDERED AND ADJUDGED, this 27th day of March, 2018.

s/ HENRY T. WINGATE
UNITED STATES
DISTRICT JUDGE